United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: November 21, 2005

TO : Dorothy L. Moore-Duncan, Regional Director
Region 4

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Paper, Allied-Industrial, Chemical &
Energy Workers Local 2-375
(Weber Display and Packaging Co.) 554-1433-3300
Case 4-CB-9418-1 712-5042-6700

The Region originally submitted this 8(b)(3) case for advice as to whether a most-favored-nations clause contained in a side letter is enforceable under Section 8(d) of the Act, when it was agreed to by only one member of a Union's bargaining team, was not presented to the Union's full bargaining committee or to the employees for ratification, and was not included or referred to in the final collective-bargaining agreement signed by the Union's bargaining committee. We concluded that the most-favored-nations clause is not an enforceable agreement because the Union's procedures for binding the Union were well known to the Employer's attorney and the Union business representative who signed that side letter did not have actual or apparent authority to bind the Union to such an agreement on his own.[1]

The Region has resubmitted this case as to whether evidence of a similar secret agreement, allegedly executed in 1996 by the same Union business representative, provided the Employer with an adequate basis to reasonably believe that the business representative had the authority to execute a secret, but fully enforceable, side agreement in 2001. We conclude that the Employer's additional evidence fails to establish that the business representative had actual or apparent authority to execute the 1996 secret agreement and thus fails to establish that he had any authority to execute the 2001 agreement.

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[1] See Paper, Allied-Industrial, Chemical & Energy Workers International Union, Local 2-375 (Weber Display), Case 4-CB-9418, Advice Memorandum dated August 29, 2005.

FACTS[2]

After the Region advised the Employer of our conclusion and decision to dismiss the charge, the Employer provided additional evidence related to the parties' bargaining: a copy of an October 21, 1996 letter, signed by the same business representative who signed the 2001 letter, that allegedly detailed a previous secret most-favored-nations clause.

The 1996 Contract and Side Letter

On or about July 30, 1996, the parties completed negotiations for a successor agreement and the Union's bargaining committee unanimously recommended that the bargaining unit ratify the contract. Employees subsequently ratified the agreement, effective by its terms from July 28, 1996, through July 27, 2001.[3]

By letter dated October 21, 1996, the Employer's attorney asked the Union business representative who signed the 2001 side letter to "confirm" that during the then-most recent negotiations the parties "agreed to memorialize four (4) side agreements in a Letter of Understanding." Those purported agreements were to 1) expand the current four step disciplinary system to five steps; 2) meet "as soon as possible" to explore a more strict attendance policy; 3) accord to the Employer's health and welfare obligations "most-favored-nations" status with respect to any health and welfare clause negotiated with other "independent" box manufacturers; and 4) require disabled employees to advise the Employer if they receive Social Security disability benefits.[4] The letter then directed the business representative to sign and return the letter if it "accurately set[] forth the agreement [the parties] reached during negotiations[.]"

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[2] The underlying facts are fully addressed in our August 29, 2005, memorandum.

[3] The precise date that the bargaining unit ratified the agreement is unknown.

[4] Of the four items, the first dealing with an expanded disciplinary system was included in the parties' 1996 collective bargaining agreement and ratified by the membership. The parties' dealings regarding the other subjects are discussed infra.

The business representative signed the letter and returned it to the Employer's attorney without having any conversations with the Employer's attorney regarding the substance of the letter. The business representative did not advise anyone associated with the Union that the Employer's attorney had asked him to sign the 1996 letter, nor that he had signed and returned the letter to the Employer's attorney. There is also no evidence that the Employer disclosed the substance of the 1996 letter to any Union representative, agent, or official other than the signatory business representative.

Some time in 1999, the Union negotiated a contract with another box manufacturer that, from the Employer's point of view, contained a more favorable health and welfare benefit package. The Employer claims that its attorney contacted the business representative who signed the 1996 letter, and attempted to invoke the most-favored-nations clause. The Employer asserts that the business representative stated that Union's agreement with the other box manufacturer did not implicate the most-favored-nations clause because the other box manufacturer was not "independent." The Union asserts, to the contrary, that the business representative only told the attorney that the alleged side agreement was unenforceable because he never had the authority to bind the Union. The Union claims that the box manufacturer whose benefit plan prompted the Employer's inquiry in 1999 was an "independent" and, if the 1996 letter were enforceable, the most-favored-nations clause would have been triggered by that box manufacturer's agreement.

The Employer did not, through its attorney or otherwise, make any other attempt to enforce the purported most-favored-nations clause or any other obligations allegedly created by the 1996 letter.

ACTION

We adhere to our earlier conclusion that the alleged side agreement to the parties' 2001 contract is unenforceable. The Employer's new evidence does not establish that the Union's business representative had actual or apparent authority to execute the 1996 secret side agreement and, thus, the Employer had no reasonable basis to believe that the business representative had authority to execute the 2001 secret side agreement.

Under common law agency principles, actual authority refers to the power of an agent to act on his principal's behalf when that power is created by the principal's manifestation to him. That manifestation may be either express or implied. Apparent authority, on the other hand,

results from a manifestation by a principal to a third party that another is his agent. Thus, a principal will be held responsible for actions of its agent when it knows or "should know" that its conduct in relation to the agent is likely to cause third parties to believe that the agent has authority to act for the principal.[5]

The party asserting the existence of an agency relationship has the burden of proving its assertion.[6] Thus, to establish that the business representative had the authority to execute a binding side agreement, the Employer must show that the Union "instigated, authorized, solicited, ratified, condoned or adopted" his statements or conduct.[7] The Employer's evidence regarding the 1996 letter fails to establish that the Union's business representative had actual or apparent authority to execute such an agreement.

First, the evidence regarding the 1996 letter does not undermine our prior conclusion that the Union's business representative did not have actual authority to bind the Union to the 2001 side letter. As noted in our earlier memorandum, the Union's constitution and by-laws expressly limit the business representative's authority and do not grant to him or any other agent the authority to execute any side agreements that could bind the Union. It is also clear that the business representative explicitly advised the Employer in 2001 that he did not have the authority to enter into binding agreements on his own. Nothing in the Employer's additional evidence regarding the 1996 letter contradicts that statement or the Union's limitations of the business representative's authority. The Employer presented no evidence that suggests that the Union ever directed or expressly authorized the business representative to execute the 1996 side agreement, or the 2001 side agreement.[8]

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[5] Tyson Fresh Meats, Inc., 343 NLRB No. 129, slip op. at 2-3 (2004), quoting Restatement 2d, Agency, § 27 and citing Communications Workers Local 9431 (Pacific Bell), 304 NLRB 446 fn. 4 (1991). See also, Dentech Corp., 294 NLRB 924, 925 (1989) (citing Service Employees Local 87 (West Bay Maintenance), 291 NLRB 82 (1988)).

[6] Flying Foods Group, 345 NLRB No. 10, slip op. at 45 (2005) citing Millard Processing Services, 304 NLRB 770, 771 (1991), enfd. 2F.3d 258 (8th Cir. 1993), cert. denied 510 U.S. 1092 (1994).

[7] Battle Creek Health System, 341 NLRB No. 119, slip op. at 11 (2004) (citations omitted).

[8] See, e.g., State County Employees AFSCME Council 71 (Golden Crest), 275 NLRB 49, 50 (1985) (employer was aware,

Second, the Employer adduced no evidence establishing that the business representative had apparent authority to enter into any side agreement in 1996. The Union itself made no statement nor engaged in any conduct in 1996 that would have led the Employer to reasonably believe that the business representative had the authority to execute a secret side agreement at that time. The Employer in 1996 contacted only the business representative, not the Union's negotiating committee as a whole, nor any senior Union official, regarding the 1996 side agreements. After receiving the signed letter from the business representative, the Employer did not advise the Union that it had a binding side agreement regarding any of the items addressed in that letter.[9] Indeed, when advised of the existence of the document in 2005, the Union immediately disavowed it, arguing that the business representative lacked the authority to enter into such an agreement. The Employer's assertion, that the 1996 letter demonstrates the business representative was authorized to execute binding agreements, rests on the business representative's repeated conduct rather than any manifestation by the Union. It is elementary, however, that an agent cannot create his own authority, real or apparent.[10] Thus, there is no basis to conclude that the Union expressly or tacitly authorized or ratified the 1996 side agreement.[11]

The Employer's failure to enforce or even refer to the 1996 letter previously, strongly undermines its suggestion now that it considered the 1996 letter to be a binding agreement. When the Employer attempted in 2002 to enforce

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or reasonably should have been aware, that union negotiators' authority was limited to negotiations and could not, in the absence of ratification, bind the union to a contract).

[9] The Employer does not dispute the Union's claim that prior to the Employer's September 2005 disclosure, the Union had no knowledge of the 1996 side letter.

[10] Wometco-Lathrop Company, 225 NLRB 686, 688 (1976).

[11] See, e.g., Wometco-Lathrop Company, 225 NLRB at 688 (employer not bound by the actions of its alleged agent where the employer timely disavowed the purported agent's conduct). See also, Plumbers, Local Union No. 195 (McCormack-Young Corp.), 233 NLRB 1087, 1088 (1977) (absent proof that union was aware of picketers' misconduct and failed to disavow it, the Board cannot hold a union liable for the misconduct).

the most-favored-nations clause it argued was created by the 2001 side letter, it never raised the 1996 agreement. Indeed, before it recently disclosed the letter to the Region, it had not invoked it with anyone other than the business representative who signed it. Even then, the Employer's attorney merely referred to the letter in a single conversation with the business representative, chiding him for agreeing to a more favorable health and welfare agreement with the other box manufacturer. At no time did the Employer ever formally demand that the Union honor the purported 1996 "most favored notions" agreement.

The Employer also failed to rely on the 1996 letter when enforcing other portions of that purported agreement. For example, some time in or about August 1997 the Employer implemented a stricter attendance policy. Arguing that the Employer's change violated the contract, the Union filed an unfair labor practice charge and a grievance related to the new policy. The parties eventually settled the charge and grievance when the Employer agreed to rescind its change and abide by the contractual policy. The Employer never cited the 1996 letter as authority for its change in policy. In sum, the Employer adduced no evidence that the 1996 secret agreement was ever enforced or that the Union ever indicated that it was enforceable.

The Employer's conduct in bargaining for the 2001 agreement also supports our conclusion that the 1996 agreement was nothing more than an unenforceable agreement between the Employer's attorney and the Union's business representative. During that bargaining, no Employer negotiator argued to retain the benefit that would have been created by the 1996 letter, nor did the Employer cite the 1996 letter as precedent for including a similar clause in the 2001 contract. Indeed, the Employer's attorney did not even cite the 1996 side letter when exploring with the business agent the possibility of executing a similar side letter to the 2001 agreement.

In sum, the Employer has presented no evidence that the Union business representative had any express authority to execute the 1996 side agreement. Moreover, there is no evidence that the Union acted so as to confer apparent authority on the business representative in the eyes of the Employer. Accordingly, the existence of that agreement does not undermine our prior conclusion that the 2001 side letter was unauthorized and not binding on the Union. The Region should therefore dismiss the charge, absent withdrawal.

B.J.K.